

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Reexamination of the Comparative Standards for	)	MM Docket No. 95-31
Noncommercial Educational Applicants	)	
	)	
To: The Commission		

**JOINT COMMENTS OF BEACON BROADCASTING CORPORATION AND  
UNITED EDUCATIONAL BROADCASTING, INC.**

Beacon Broadcasting Corp. ("Beacon"), licensee of noncommercial educational FM broadcast station WJCS, Allentown, Pennsylvania, and United Educational Broadcasting, Inc. ("United"), licensee of noncommercial educational FM broadcast station WBMR, Telford, Pennsylvania, through counsel, hereby offer these brief comments in response to the FCC's *Second Further Notice of Proposed Rule Making*, FCC 02-44, released February 14, 2002 (the "*Second Notice*"), concerning the future of noncommercial educational broadcasting in the unreserved portion of the FM band.

The saturation of the portion of the FM band that is reserved for NCE broadcasting is well known. Because of the need to avoid interference to television Channel 6, and the contour-protection method of assigning frequencies in the reserved portion of the band, the frequencies between 88.1 MHz and 91.9 MHz are severely congested, especially in the northeastern United States where population centers are located more closely together.<sup>1</sup>

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<sup>1</sup> Concomitantly, the "unreserved" portion of the band, representing 80

As a consequence, many NCE stations operate with minimal power, often barely enough to serve the communities to which they are licensed. For a licensed station seeking to enlarge its coverage area, increased power is rarely an option, there are few if any opportunities to apply for a construction permit for a new station, and interference concerns preclude construction of even a translator in the reserved portion of the band. WBMR and WJCS illustrate each of these points in different ways. WJCS, operating on 89.3 MHz, is licensed to operate with an ERP of only 150 watts. Because of terrain anomalies, it receives complaints of interference within its very limited 60 dBu contour that apparently arise from the operation of a station on 89.5 MHz at Penn Argyll, Pennsylvania. WBMR, operating on 91.7 MHz, operates with only 115 watts ERP. It has been able to extend its service via a translator in the unreserved portion of the band, W245AG, at Gladwyne, Pennsylvania. Efforts to extend WBMR's programming service to Allentown via a translator have been frustrated since the FCC imposed a freeze on all new FM applications in the unreserved portion of the band in November 1997. United filed an application (BPFT-19970711TD) for a construction permit for a new FM translator on Channel 294 at Allentown well in advance of the imposition of the freeze. Because the staff mistakenly believed that the proposed tower location was not registered, the Allentown translator application was not listed on the last "A" cut-off list released prior to the freeze; United's application has remained in limbo, therefore, for nearly five years. To their best knowledge, neither Beacon nor United will be able to extend their service, or in Beacon's case be able

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percent of the spectrum allocated for FM broadcasting, though congested, is relatively less saturated than the "reserved" band, because channel assignments are based, generally, on a Table of Allotments incorporating height and power limitations and minimum mileage separation requirements.

to remedy interference to which it is now subject, without access to the unreserved portion of the band.

Hundreds of NCE FM stations face similar impediments to improvement of service. It is, therefore, imperative, that the FCC act promptly to resolve this proceeding, in a way that assures NCE applicants access to the unreserved portion of the band to meet unfilled needs for new or improved noncommercial educational service and does not promote further litigation that will only produce uncertainty and further delay the implementation of new, expanded and, in some cases, replacement NCE service.

Before addressing the general issue of access to the unreserved portion of the FM band for NCE use, Beacon and United believe that the FCC should determine that FM translator applications are not encompassed by the Congressional directive to choose among competing applications for regular, commercial licenses through competitive bidding. FM translators are not referred to in the statute; the legislative history refers only to “applications for secondary broadcast services such as low power television, television translator stations and television booster stations.” H.R. Conf. Rep. No. 105-217 (1<sup>st</sup> Sess.)(1997) at 1266. This portion of the legislative history strongly indicates that the FCC’s auction authority was limited to licenses for full-power stations and stations in the specifically enumerated secondary services. FM translators, therefore, are not within the ambit of Section 309(j). The FCC already has an efficient system for resolving mutually exclusive FM translator applications in Section 74.1233(d)-(g) of the Rules.

As to full-power stations -- and for FM translators, if the FCC rejects the perfectly reasonable conclusion that applications for FM translators are not within the ambit of its auction authority -- the *Second Notice* (¶ 8) offers only three equally unsatisfactory options:

(1) preclude NCE entities from obtaining licenses in the unreserved portion of the band; (2) permit NCE entities to acquire licenses in the unreserved band only in the absence of competing commercial applications; (3) providing NCE entities “additional opportunities” to reserve channels in the Table of Allotments for noncommercial educational use. None of these options is acceptable.

The first option – making NCE applicants ineligible – is a reversal of at least forty years of FCC policy. For NCE FM licensees in much of the continental United States, its practical effect would be to permanently preclude any improvement of existing service. Seemingly the only virtue cited for this option in the *Second Notice* is that it is “consistent” with the interpretation of Section 309(j) adopted by the U.S. Court of Appeals for the District of Columbia Circuit in *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001). In *NPR*, the Court held that the FCC is precluded from awarding noncommercial educational licenses by a system of competitive bidding. It did not hold that the FCC is barred from granting NCE licenses in the unreserved portion of the FM band. There is no evidence that Congress, when it limited the FCC’s authority to utilize a system of competitive bidding, intended to reverse long-standing FCC policy and create a *de facto* reservation of historically unreserved spectrum. The original version of the House and Senate bills limited the auction exemption to applications for reserved channels. This limitation was eliminated from the final version of the legislation; had Congress intended that noncommercial educational applicants would be barred from filing for channels outside the reserved band, the elimination of the limiting language would have been unnecessary. The strong implication is that Congress expected that the FCC would continue to permit noncommercial educational entities to gain access to the unreserved portion of the band.

The second option – awarding NCE licenses only in the absence of competing applications – is no improvement over the first. At worst, it has the same practical consequence as the first option, as it is likely that any new filing window will draw applications from commercial as well as noncommercial applicants, particularly in areas of the country where the available spectrum is in critically short supply. At best, it would condemn NCE applicants to a form of second-class citizenship, granting a commercial application over an NCE application without regard to any possible need for new, expanded or even replacement NCE service.

The third option – creating a means by which NCE entities can reserve allotments between Channels 221 and 300 for noncommercial educational use – has merit, in principle if not necessarily in the specifics of the proposal, but utterly fails to address the necessity for NCE licensees to be able to gain access to the unreserved portion of the band for the construction of translators, which are not assigned according to a Table of Allotments.<sup>2</sup>

The *Second Notice* offers no proposal relating to conflicts between NCE and commercial applicants for FM translators and, in fact, doesn't even discuss the issue.

The FCC's task, therefore, is to act creatively and responsively to adopt a system that permits NCE entities to have access to the unreserved portion of the band, does not discriminate against NCE applicants, and respects Congress's determination that the award

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<sup>2</sup> Some aspects of the FCC's specific proposals concerning this option discriminate against NCE entities, specifically, the necessity, in the case of future FM allotments (§§ 15-16) to show that a certain percentage of the population with the 60 dBu contour would receive a first or second NCE service, and in the case of existing vacant allotments, a requirement (§ 18) to show that utilization of a reserved frequency would provide service to 50 percent or less of the area within the 60 dBu contour of a station operating with full facilities at the reference point for the allotment.

of NCE licenses should not be subject to competitive bidding. In its *Further Notice of Proposed Rule Making* in this docket, 13 FCC Rcd 21167 (1998), the FCC solicited (*Further Notice*, ¶¶ 43-44) comments on a hybrid system that, in the case of mutually exclusive commercial and NCE applications, would decide by a weighted lottery whether a frequency would be licensed for commercial or NCE use; if the outcome of the lottery favored a commercial applicant, then mutually exclusive applications would be resolved by competitive bidding. (The *Second Notice* implies, at n. 16, that this proposal related to applications for reserved channels only. That is not correct.) Neither the *Report and Order* by which the FCC first attempted to resolve this proceeding nor the *Second Notice* even acknowledges the possibility of a hybrid system. This is hardly reflective of reasoned decision-making.

The essential elements of a proper resolution of this proceeding (apart from a determination that FM translator applications should not be subject to auctions) are these:

1. NCE entities must have the opportunity to apply for frequencies in the unreserved portion of the FM band.
2. The rules and criteria for filing for frequencies in the unreserved portion of the band must not discriminate against NCE entities and in favor of commercial applicants.
3. The FCC should permit NCE entities to reserve channels in the band from 92.1 MHz to 107.7 MHz upon a showing that interference considerations preclude construction and licensing of a comparable facility in the reserved portion of the band.
4. A hybrid system must be implemented that permits the FCC to decide, in cases where NCE and commercial entities have filed mutually exclusive applications, whether to award the license to an NCE entity, without an auction, or to a commercial entity through competitive bidding (if required).
5. While NCE licenses may not be awarded through competitive bidding, NCE entities may not be barred from participating in competitive bidding, if the

FCC has determined that (by a point or a lottery system) that a commercial as opposed to NCE license should be awarded.

Respectfully submitted,

BEACON BROADCASTING  
CORPORATION AND UNITED  
EDUCATIONAL BROADCASTING, INC.

By /s/ J. Geoffrey Bentley  
— J. Geoffrey Bentley

BENTLEY LAW OFFICE  
P.O. Box 710207  
Herndon, VA 20171  
(703)793-5207  
(703)793-4978(facsimile)

Their Attorney

May 15, 2002